

# Need Service – Welcome to the Hague Convention



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It’s a tale as old as time: boy meets girl; boy marries girl; boy moves to Prague and girl files a petition for divorce in Kansas and attempts to serve process on boy through the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents (the “Hague Convention on Service”). Okay, maybe this is not as common of an issue, but as international travel becomes more and more accessible, and more and more people begin remotely working and traveling our ever more connected world, this is one issue that has a growing potential to come up in family law practice. While there are a multitude of other factors to consider, like personal jurisdiction, this article will not discuss those factors. This article is necessarily limited and only brushes the surface of international service of process. It in no way is meant to encompass all that the Hague Convention on Service is meant to explore. Rather, it will pose questions and provide suggestions to assist family law practitioners faced with these issues on a more frequent basis.

When serving process on someone abroad, there are three sets of rules the serving party must follow: Kansas law; federal law; and, when applicable, the Hague Convention. We say “when applicable” because not every country is a signatory to the Hague, and not every means of service is governed by the Hague Convention on Service.<sup>1</sup> The intent of this article is to focus primarily on the Hague Convention on Service and the basics of how to serve your opposition abroad.

## **Kansas Law**

If your client is filing a divorce action in Kansas, the first place to look when determining how to effectuate proper service is Chapter 23 of the Kansas Statutes Annotated. Unless waived by the respondent, K.S.A. 23-2704(e) requires that service be made pursuant to Title 3 of Chapter 60. The Kansas Supreme Court has held that “the fact that a party has actual knowledge

of the pendency and nature of an action against him or her is not a substitute for service. Notice or knowledge must come from service of process, or there must be some valid waiver.”<sup>22</sup>

Service of process outside of Kansas is governed by K.S.A. 60-308(a)(2), which states that the service of process must be made: (A) in the same manner within this state, by an officer authorized to serve process in this state or in the state where the party is served; or (B) by a party or the party’s attorney pursuant to subsection (c) of K.S.A. 60-303, and amendments thereto.

K.S.A. 60-304(a) states that service upon an adult individual, as opposed to a corporation, LLC, LLP, or governmental body, may be served upon the individual or their authorized agent by appointment or law. Service by return receipt delivery must be addressed to an individual at their “dwelling or usual place of abode.”<sup>23</sup> However, this is not helpful in the context of international service abroad, and therefore the next step in determining proper service lies within the Federal Rules of Civil Procedure.

## Federal Law

The Federal Rules of Civil Procedure (“FRCP”), Rule 4(f) states “unless federal law provides otherwise, an individual -- other than a minor, an incompetent person, or a person whose waiver has been filed -- may be served at a place not within any judicial district of the United States: (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.”

Adherence to the Hague Convention on Service is mandatory where it applies,<sup>4</sup> and the Hague Convention on Service gives an exclusive list of service methods.<sup>5</sup> FRCP 4(f)(1) essentially codifies the Supreme Court’s ruling in *Volkswagenwerk Aktiengesellschaft v. Schulnk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 722 (1988). So, when you are serving a (soon to be ex) husband who is exploring the mountains of Switzerland or is now a missionary in the Republic of Moldova, you must follow the Hague Convention on Service’s requirements for proper service or be prepared to have your petition dismissed for lack of service.

FRCP 4(f)(2) applies where the Hague Convention on Service does not. Rule 4(f)(2) states: “if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice: (A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction; (B) as the foreign authority directs in response to a letter rogatory or letter of request; or (C) unless prohibited by the foreign country’s law, by: (i) delivering a copy of the summons and of the complaint to the individual personally; or (ii) using any form of mail that the

clerk addresses and sends to the individual and that requires a signed receipt; or (3) by any other means not prohibited by international agreement, as the court orders.”

## The Hague Convention on Service

The Convention is a multilateral treaty formed in 1964, and, as of the date of this article, 79 states are signatories. The Convention covers service abroad of judicial and extrajudicial documents in both civil and commercial matters, so it is prudent to read through the basic process of service before filing a client’s petition for divorce.

The Convention requires each contracting state to designate a central authority, in conformity with the laws of the contracting state, to receive requests for service.<sup>6</sup> Once you have determined who the central authority is, you must hand off the documents to “the authority or judicial officer competent under the law of the State in which the documents originate,” who shall then forward them to the Central Authority of the addressed state. In the United States, this “competent authority” is generally the originating state’s Secretary of State’s office.<sup>7</sup> Once the receiving country’s central authority receives the proper request, it is required to serve the documents by the appropriate agency, either “(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.”<sup>8</sup> The Central Authority has the discretion to require the documents be written in the official language of the addressed state.<sup>9</sup>

The Central Authority shall then complete a certificate proving the documents were served, stating the method in which the documents were served, and forward them back to your client.<sup>10</sup> It is important to get proof of service, and show the method used was prescribed by the internal law of the addressed state. Proof of service is essential. If after sending service of process, the defendant does not appear at the hearing, judgment shall not be granted until it is first established that “(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.”<sup>11</sup>

However, if no certificate of service or delivery has been received, the judge may still declare judgment only if “(a) the document was transmitted by one of the methods provided for in this Convention, (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, [and] no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the

competent authorities of the State addressed.”<sup>12</sup> This means that a party can provide proof of service by mail for prima facie evidence that “every reasonable effort” was made in serving process, so long as the receiving state has not objected.

K.S.A. 60-303(c)(1) allows for service by mail within the state of Kansas, K.S.A. 60-308(a)(2)(A) provides for service by mail outside of Kansas, and FRCP 4(f)(2)(C)(ii) provides for service by mail to individuals in foreign countries. Technically, the Hague Convention on Service does not allow for service by mail and therefore practitioners must use extreme caution if choosing this method. Article 10 of the Convention states that, “provided the State of destination does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad.”<sup>13</sup> Article 10(a) therefore does not *allow* for mail service; it simply states that it will not *interfere* with mail service. Therefore, service by mail to a foreign country is governed by FRCP 4(f)(2).

Previously, there was immense confusion in federal courts with respect to the use of the word “send” in Article 10(a), and whether that meant the same as “effect service.”<sup>14</sup> But the United States Supreme Court in a relatively recent case put those questions to rest when it determined that service by mail is permissible under the Hague if two conditions are met: (1) the receiving state has not objected to service by mail; and (2) service by mail is authorized under otherwise-applicable law.<sup>15</sup>

Before attempting service by mail, an attorney must first check to ensure that the addressed State does not object to it, and they must then make certain to follow United States rules on service by mail, as well as the foreign States’ rules.<sup>16</sup>

While this is not news to many attorneys, and is not technically service under the Convention, it is still relevant to the discussion at hand, and is still important to consider. The reason being because in our nearly post-corona world, service by mail creates the new issue of no-signature deliveries.<sup>17</sup> Many mail carriers are no longer requiring a physical signature on deliveries, which means that no proof of service is obtained, as required by FRCP 4(f)(2)(C)(ii). Absent that proof, proper service has not been achieved and the opposing party has not received proper notice of the suit to proceed. Therefore, if no certificate of service has been obtained through the state’s Central Authority, the sending party may have a much more difficult time showing that “every reasonable effort” without a physical signature was made; even if the receiving party was, in fact, properly served by mail.

Let us finish by playing through one scenario: Megan walks into your office claiming that her husband, Harry, has moved back to his home in England. She and her son, Archie, have been unable to reach Harry through traditional means and Megan has decided that divorce is imminent. You draft a petition for divorce and you submit the pleading and ancillary documents to the court, but now you need to make sure Harry

is properly served process.

You address the documents<sup>18</sup> to the United Kingdom’s Central Authority, which you have discovered, after some research, is “Her Majesty’s Principal Secretary of State for Foreign Affairs.” After the Secretary of State forwards these documents, Article 10(b) and (c) allow for “competent persons of the State” to serve process on individuals, and the U.K. does not preclude any person in another Contracting State who is interested in a judicial proceeding from effecting service in the U.K. directly through a “competent person,” other than a judicial officer, or official. Therefore, the Central Authority will likely instruct a “solicitor,” an advocate in the U.K. judicial system, to effect personal service on Harry, so long as the solicitor does so in a manner compliant with the Civil Procedure Rules of England and Wales. If service is successful, the U.K. will send Megan a Certificate of Service.<sup>19</sup> This Certificate of Service will likely be enough for a prima facie showing of proper service.

If Harry successfully eludes the solicitor, you may attempt service by mail, since the United Kingdom does not object. However, for reasons set forth above, this means of service of process should be very carefully considered and you must require a signed return receipt. If after six months have gone without effective personal service, you may attempt to have the judge declare a judgment under Article 15.

## Conclusion

The Hague Convention on Service may not be something you were likely to encounter regularly 10 or even five years ago, but in our rapidly shrinking world these fact patterns are walking through the doors of family law practitioners more and more. It would be prudent, then, for all practitioners to have a working understanding of its process. Even attorneys practicing in Kansas. Because of the many variables and moving parts, it would be easy for an attorney accidentally improperly attempt service of process. But with a basic understanding and the right tools, these accidents can be avoided, and your client can have their day in court.

- 1 In those instances, we must look to FRCP 4(f)(2), which is explored in more detail herein.
- 2 *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, 812, 987 P.2d 1096 (1999)
- 3 As an interesting aside, while “usual place of abode” is generally clearly defined, the Court of Appeals has interpreted K.S.A. 61-3003(d)(1), (which is textually identical to K.S.A. 60-304) to mean the place usually occupied by the person, or where the person usually sleeps, which is not the same as “domicile.” *Coastal Credit, LLC v. McNair*, 57 Kan.App.2d 31, 446 P.3d 495 (2019). In *McNair*, the Kansas Court of Appeals held that a soldier on a six-month deployment to Africa had his “usual place of abode” in the military encampment where he was stationed, rather than in Kansas where his family lived. *Id.* at 42.
- 4 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104, 2108, 100 L. Ed. 2d 722 (1988)
- 5 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706, 108 S. Ct. 2104, 2111, 100 L. Ed. 2d 722 (1988) (“The Convention provides simple and certain means by which to serve process on a foreign national. Those who eschew its procedures risk discovering that the forum’s internal law required transmittal of documents for service abroad, and that the Convention therefore provided the exclusive means of valid service.”)
- 6 20 U.S.T. 362, T.I.A.S. No. 6638, Art. 2.
- 7 The Hague Conference on Private International Law, <https://www.hcch.net/en/states/authorities/details3/?aid=353>
- 8 20 U.S.T. 362, T.I.A.S. No. 6638, Art. 5
- 9 *Id.*
- 10 20 U.S.T. 362, T.I.A.S. No. 6638, Art. 6
- 11 20 U.S.T. 362, T.I.A.S. No. 6638, Art. 15
- 12 *Id.*
- 13 20 U.S.T. 362, T.I.A.S. No. 6638, Art. 10
- 14 Even the United States District Court of Kansas had a difficult time believing that the word “send” could mean “serve” in *Brand v. Mazda Motor of Am., Inc.*, 920 F. Supp. 1169, 1172 (D. Kan. 1996)
- 15 *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513, 197 L. Ed. 2d 826 (2017)
- 16 For a list of signatories and their objections or reservations, see The Hague Conference on Private International Law, <https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf>
- 17 Lukken, Aaron, Service by Mail Just Became and Even Worse Idea (March 18, 2020) <https://www.haguelawblog.com/2020/03/service-by-mail-just-became-an-even-worse-idea/>
- 18 Be sure to note what documents are required for service before sending.
- 19 England does not object to service-by-mail, and therefore your client may also submit the documents to be addressed and sent by the clerk, pursuant to FRCP 4(f)(2)(C)(ii), but this is not generally a good idea.



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